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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York,

VINCENT GAZZETTA as Director of the Division of Teacher Education and Certification of the Education Department of the State of New York, and

ROBERT ASHER, as Director of the Division of Professional Conduct of the Education Department of the State of New York, *Appellants,*

against

SUSAN M. W. NORWICK, *Appellee,*

TARJA U. K. DACHINGER, *Intervenor-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF

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TABLE OF CONTENTS

PAGE

A. New York Education Law § 3001(3) and related provisions qualify teachers for elementary and secondary public schools. Immigrant aliens who have the capacity to apply for citizenship but do not are denied permanent certificates by statute. Related provisions authorize temporary certificates for aliens admitted for temporary residence and for temporary instructional needs including exchange teaching 1

B. Education Law Article 52-A provides for an experimental New York City Community School District System. The article has no effect on the statewide "citizenship" requirements for teaching certificates and is not inconsistent with them 8

C. Education Law § 3001(3) is excepted from strict equal protection scrutiny because the public school teachers it qualifies make important discretionary decisions and execute broad public policy which substantially affects American democratic institutions. No fundamental right to academic freedom or of access to "common occupations" is invoked by the classification 10

D. Education Law § 3001(3) meets all equal protection and due process standards because it precisely enforces New York's substantial interest in training public school pupils for their roles as citizens 18

E. No general or specific federal laws pre-empt Education Law § 3001(3) 22

Conclusion 25

Table of Cases

PAGE

Brown v. *Board of Education*, 347 U.S. 483 (1954) .. 12

C.D.R. Enterprises, Ltd. v. *The Board of Education*, 412 F.Supp. 1164 (E.D.N.Y. 1976); *aff'd sub. nom., Lefkowitz* v. *C.D.R. Enterprises, Ltd.*, 429 U.S. 1031 (1977) 9

Cleveland Board of Education v. *Lafleur*, 414 U.S. 632 (1974) 22

De Canas v. *Bica*, 424 U.S. 351 (1976) 22, 23

Epperson v. *Arkansas*, 393 U.S. 97 (1968) 17

Florida Avocado Growers v. *Paul*, 373 U.S. 132 (1963) 23

Foley v. *Connelie*, 435 U.S. 291 (1978) 10, 11, 18, 23

Graham v. *Richardson*, 403 U.S. 365 (1971) 22

Heim v. *McCall*, 239 U.S. 175 (1915) 23

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 23

In Re Griffiths, 413 U.S. 717 (1973) 12, 13

Ingraham v. *Wright*, 430 U.S. 651 (1977) 15

Kay v. *Board of Higher Education*, 173 Misc. 2d 943, 18 N.Y.S. 2d 821 (Sup. Ct. N.Y. Co.); *aff'd*, 259 App. Div. 879, 20 N.Y.S. 2d 1016; *leave app. den.*, 259 App. Div. 1000, 21 N.Y.S. 2d 396 (1st Dep't); *leave app. den.*, 284 N.Y. 578 (1940) 3

Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) .. 16

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 17

Patsone v. *Pennsylvania*, 232 U.S. 138 (1914) 23

Perkins v. *Smith*, 370 F.Supp. 134 (D.Md. 1974); *aff'd* 426 U.S. 913 (1976) 11

Pickering v. *Board of Education*, 391 U.S. 563 (1968) 16

Red Lion Broadcasting v. *F.C.C.*, 395 U.S. 367 (1969) 5

PAGE

San Antonio School Dist. v. *Rodriguez*, 411 U.S. 1 (1973) 16

Shelton v. *Tucker*, 364 U.S. 479 (1960) 16, 17

Stanley v. *Illinois*, 405 U.S. 645 (1972) 22

Sugarman v. *Dougall*, 413 U.S. 634 (1973) ..10, 11, 12, 14, 23

Sweezy v. *New Hampshire*, 354 U.S. 234 (1957) 16

Takahasi v. *Fish & Game Commission*, 334 U.S. 410 (1948) 22, 23

Tinker v. *Des Moines School District*, 393 U.S. 503 (1969) 16

Truax v. *Raich*, 239 U.S. 33 (1915) 18, 23

U.S. v. *Larionoff*, 431 U.S. 864 (1977) 5

Vlandis v. *Kline*, 412 U.S. 441 (1973) 22

Weinberger v. *Salfi*, 422 U.S. 441 (1975) 22

Constitutions, Statutes and Regulations Cited

Federal Statutes

8 U.S.C. § 1101 *et seq.* 22

8 U.S.C. § 1101 7

8 U.S.C. § 1102 23

8 U.S.C. § 1153 23

8 U.S.C. § 1182 ..... 7, 23

8 U.S.C. § 1421 4

8 U.S.C. § 1445 ..... 4, 22

20 U.S.C. § 512a 6

20 U.S.C. § 1173 6

22 U.S.C. § 2451 6

PAGE

22 U.S.C. § 2452 ..... 6, 7
22 U.S.C. § 2459 7
42 U.S.C. § 1981 22
P.L. 87-256 (1961) 6
P.L. 94-482 (1976) 6

STATE CONSTITUTION

N.Y. CONST.,
Art. 5, § 2 11
Art. 5, § 4 11
Art. 11, § 1 11

STATE STATUTES

N.Y. EDUCATION LAW,
Art. 52-A 8
§ 550 ..... 3, 4
§ 1602 9
§ 1702 9
§ 2012 9
§ 2102 9
§ 2204 15
§ 2507 15
§ 2553 9
§ 2567 15
§ 2590-c 9
§ 2590-e 9, 15
§ 2590-g 8

PAGE

§ 2590-h 8, 15
§ 2590-e 8, 15
§ 2890-e 9
§ 3001 ..... *passim*
§ 3001-a ..... *passim*
§ 3002 ..... 2, 3
§ 3005 ..... *passim*
§ 3204 13

N.Y. LABOR LAW,
§ 222 9
L. 1972, c. 29, § 1 8
L. 1969, c. 330 8
L. 1940, c. 341, § 1 6

FEDERAL REGULATIONS

20 C.F.R. § 656.10 24

STATE REGULATIONS

8 NYCRR,
Part 7 17
Part 8.83 17
§ 80.1 2
§ 80.2 ..... *passim*
§ 80.15 2
§ 80.16 2
§ 100.1(e) 13

MISCELLANEOUS AUTHORITIES

Books

HESS & TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN (1967) 20, 21

JENNINGS & NIEMI, THE POLITICAL CHARACTER OF ADOLESCENCE (1974) 20, 21

WEBSTER'S NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1949) 2

Articles

Note, *Aliens' Right to Teach: Political Socialization and the Public Schools*, 85 YALE L.J. 90 (1975) .. 11

Other

Senate Report No. 94-882 (May 14, 1976) 1976 U.S. CODE CONG. & ADMIN. NEWS 4713 6

House Report No. 1094 (Aug. 31, 1961), 1961 U.S. CODE CONG. & ADMIN. NEWS 2759 ..... 6, 7

McKinney's 1967 Session Laws of New York 5

Memorandum of the Education Department in Support of L. 1967, c 282, McKinney's 1967 Session Laws of New York, 1461 5

10 N.Y. State Rep. (1916) 2

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF

A. New York Education Law § 3001(3) and related provisions qualify teachers for elementary and secondary public schools. Immigrant aliens who have the capacity to apply for citizenship but do not are denied permanent certificates by statute. Related provisions authorize temporary certificates for aliens admitted for temporary residence and for temporary instructional needs including exchange teaching.

Education Law §§ 3001(3), 3001-a, 3005 and 8 NYCRR § 80.2(i) qualify elementary and secondary public school teachers, not professors at New York's publicly assisted colleges and universities as appellees contend. Brief for Appellees ("Appellees' Brief"), pp. 74-75. See Brief for Appellants ("Appellants' Main Brief") p. 13, first footnote. The opening phrase of Education Law § 3001 expressly limits the section to teachers in "public schools." This limitation necessarily applies to all three subdivisions of § 3001, age (subd. 1), certification (subd. 2) and "citizenship" (subd. 3), not merely to the certification subdivision as appellees state. Appellees' Brief, p. 74. Education Law § 3001-a (temporary certification for first preference aliens under quota disabilities) and § 3005 (temporary certification for foreign exchange teachers) are also expressly limited to "public school" teachers. Part 80 of Title 8, NYCRR which includes § 80.2(i), is concerned exclusively with elementary and secondary teaching certificates for public schools. See esp. 8 NYCRR § 80.1(6), (10), (11), (12), (18), (25), (27), (32), (36), (37); § 80.15; § 80.16.

A public school is an "elementary or secondary school . . . usually free, maintained by . . . [a] local governmental authority." WEBSTER'S NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE, p. 2005 (2d ed. unabr. 1949). See also 10 N.Y. State Rep. 449, 451-52 (1916), the "system of free common schools" mandated by the State Constitution (now Art. 11, § 1) consists of elementary and secondary schools. Education Law § 3002 demonstrates that the Legislature intended only the dictionary, or ordinary, meaning of "public school" in §§ 3001, 3001-a and 3005. Section 3002 requires an oath to teach in both public schools and publicly assisted colleges and universities. Unlike the operative language in Education Law §§ 3001, 3001-a and 3005 which is limited to "public school" teachers, § 3002 adopts the terms "teacher" in the "public school

system" and "professor" at "college" or "university" to meet its broader purposes.*

Dicta in *Kay* v. *Board of Higher Education,* 173 Misc. 2d 943, 18 N.Y.S.2d 821 (Sup. Ct. N.Y. Co.), *aff'd* 259 App. Div. 879, 20 N.Y.S. 2d 1016, *leave app. den.,* 259 App. Div. 1000, 21 N.Y.S. 2d 396 (First Dep't), *leave app. den.,* 284 N.Y. 578 (1940), which would apply Education Law § 550 (3) [now § 3001(3)] to college professors is erroneous. Appellants' Main Brief, p. 13. Compare Appellees' Brief, p. 74 and n. 57. Therein, the state Supreme Court enjoined Bertrand Russell's appointment to City College on the ground that he was morally unfit. 18 N.Y.S. 2d, *supra,* at 826-31.** Although the court expressly disclaims reliance on the Education Law's citizenship requirements at the outset of its opinion (18 N.Y.S. 2d, *supra,* at 823), it goes on to state that the requirements are applicable on the college level. *Id.* at 824. The conclusion disregards the "public schools" limitation discussed above and confuses the "teacher's certificate" required by Education Law § 550(2) [now § 3001(2)] with a certificate evidencing appointment available to any public employee. *Ibid.**** The court also disregards the argument of the Corporation Counsel of the City of New York, representing the re-

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* The texts of the oaths included in Education Law §§ 3001-a and 3002 are identical. In both, the applicant fills in his "title" and the name of the "school, college, university, [etc.]" to which he is assigned. Appellees cite the "college" or "university" options in § 3001-a to support their argument that both §§ 3001-a and 3002 qualify public school teachers and college teachers. Brief, p. 75. They omit reference to the differences in the operative language of the two statutes.

** Emphasis was also placed on the fact that there had been no competitive examination for the position. *Id.* at 824-26.

*** If the citizenship requirements in Education Law § 550(3) were considered applicable to college professors, the certification requirements in § 550(2) also had to be applicable. See discussion, p. 2. Thus, the court was compelled to redefine "teacher's certificate" to support its conclusion.

spondent City Board of Higher Education, who urged the non-applicability of § 550(3). *Id.* at 823, 824. The Attorney General's opinion was not solicited, and there is no relevant opinion from either the state Appellate Division or Court of Appeals.

Education Law § 3001(3) requires formal application for citizenship and completion of the process in a timely manner, not a declaration of intent as appellees contend (brief, pp. 7-8, 61-63). See also Brief for *Amici Curiae,* pp. 7, 13, 30.* An application consists of filing both an application for a petition for naturalization and a petition. 8 U.S.C. §§ 1421, 1445(a)-(c). Filing a declaration of intent under 8 U.S.C. § 1445(f) does not suffice under § 3001(3) because it is not an application for citizenship under federal law.

The "citizenship" requirements in Education Law § 3001(3) are statutory, not regulatory or discretionary with the Commissioner of Education. Compare Appellees' Brief, pp. 8, 45-47, 99-101. They are codified in the first and second sentences of § 3001(3). The third sentence in § 3001(3), added in 1967, does not diminish the statutory force of the requirements. Compare Appellees' Brief, pp. 45-47, 99-101. It merely empowers the Commissioner to make regulations permitting the employment of aliens which are consistent with the limitations in the two preceding sentences and with other relevant statutes, i.e. § 3001-a, authorizing temporary certificates for first preference aliens under quota disabilities, and § 3005, authorizing temporary certificates for alien exchange teachers. Appellees' reading of the 1967 legislation as authorizing the Commissioner to certify all aliens under all circumstances

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* Aliens who do not have the capacity to apply for citizenship or to declare their intent to do so can obtain temporary certificates under 8 NYCRR § 80.2(i)(2) during the period of their incapacity. Aliens with the capacity to apply for citizenship can obtain temporary certificates only to meet emergent instructional needs. Appellants' Main Brief, pp. 7, 28. Compare Appellees' Brief, p. 9.

(brief, pp. 45-47, 99-101) disregards the history of the legislation as proposed and implemented and would deprive §§ 3001(3) (first and second sentences), 3001-a and 3005 of meaning.

When the Education Department proposed the 1967 legislation, it stated that the bill was intended to authorize only temporary certificates to meet exceptional needs. Memorandum of the Education Department in Support of L. 1967, c. 282, McKinney's 1967 Session Laws of New York ("1967 Session Laws") 1461 and Appellants' Main Brief, p. 8. It was to have no effect on the "citizenship" requirements for permanent certificates codified in the first and second sentences of § 3001(3). The bill was enacted (as L. 1967, c. 282, § 1) in the form proposed by the Department. It has always been construed and applied in conformity with the Department's initial statement about its limited scope. Section 80.2(i), Title 8 NYCRR, promulgated in its current form just after the 1967 legislation was adopted, is expressly limited to "provisional," or temporary, exceptional certificates. A subsequent proposal for a broader regulation granting permanent certificates to otherwise qualified non-applicant aliens was rejected by the Department's Office of Counsel on the ground that it was not authorized by the 1967 legislation. Memorandum, dated April 11, 1972, from James H. Whitney (Office of Counsel) to Charles C. Mackey, Jr. (Division of Teacher Certification) re: proposed amendment of Section 80.2(i), appended to this brief as Exhibit "A". Compare Appellees' Brief, pp. 45-47, 99-101. Appellants' view of the jurisdictional limitations incident to the 1967 legislation must be accepted as conclusive given appellees' failure to show any contrary indications in its history or implementation. *U.S.* v. *Larionoff,* 431 U.S. 864, 872 (1977); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969). Moreover, acceptance of appellees' view that the Commissioner received "unchecked" discretion (brief, p. 100) under the 1967 legislation would, as the departmental memorandum

(Exhibit "A") observes, effectively repeal Education Law §§ 3001(3) (first and second sentences) and 3001-a (as well as § 3005) notwithstanding the Legislature's decision to leave those statutes in full force and effect.

New York provides the "cross-cultural" public education appellees contend is lacking (brief, pp. 31-33, 64-71) through its exchange teaching program. This program was first authorized in 1940 (L. 1940, c. 341, § 1, eff. July 1, 1940, adding § 552-a to the Education Law of 1910), substantially before the federal government evidenced a similar interest for either high school or college teachers. Compare Appellees' Brief, pp. 89-96. The educational aspects of the Mutual Educational and Cultural Exchange Act of 1961, P.L. 87-256, 22 U.S.C. §§ 2451-52, cited by appellees (brief, pp. 89-90), are concerned principally with undergraduate and graduate students and teachers and with scholars, scientists, and technicians. See 22 U.S.C. § 2452 (a)(1), (b)(1), (2), (4), (5), (7), (8), (9) and House Report No. 1094 (Aug. 31, 1961), accompanying H.R. 8666 (P.L. 87-256), 1961 U.S. CODE CONG. & ADMIN. NEWS 2759, 2761-62 ("H. Rep., p. "), noting that former legislation restricted Americans studying abroad to "institutions" of higher learning while the 1961 Act permitted less formal arrangements for similarly advanced study.* The

* The two other federal laws cited by appellees (brief, pp. 90-91) do not support their argument that Congress has comprehensively regulated the international exchange of high school teachers and/or that such laws as it has enacted are inconsistent with New York's limitations on permanent and temporary teaching certificates. The International Education Act of 1966, 20 U.S.C. § 1173, is limited to undergraduate and graduate education. It authorizes some English language training for foreign teachers as well as scholars and students [§ 173(a)(7)] but obviously intends that such skills will be employed in the teacher's own country and/or to advance his own studies. As of 1976, the Act had not received any funding. Senate Report No. 94-882 (May 14, 1976) accompanying S. 2657 (P.L. 94-482), 1976 U.S. CODE CONG. & ADMIN. NEWS 4713, 4812. The Education Amendments of 1976 to 20 U.S.C. § 512a do not authorize exchange programs. They encourage instruction about the "cultures and actions of other nations . . . [to enable American students] to better evaluate the international and domestic impact of major national policies." 20 U.S.C. § 512a(b).

exchange of secondary school teachers and prospective teachers under the 1961 Act appears to be confined to improving instruction in foreign languages and related national, or "area," studies. 22 U.S.C. § 2452(b)(6); H. Rep., p. 2765. The relevant legislative history specifically approves programs like those provided by New York under Education Law § 3005 (two year certificates for exchange teachers) and cites their success as the reason for increased federal aid. H. Rep., p. 2766.* Compare Appellees' Brief, pp. 92-96. Under both the 1961 Act and state law, the alien exchange teacher is treated as a temporary visitor. He obtains a temporary visa under 22 U.S.C. § 2459(b), (c) [amending 8 U.S.C. §§ 1101(a)(15), 1182 to add the nonimmigrant "J" visa classification] and a temporary teaching certificate under Education Law § 3005. H. Rep., pp. 2765-66, 2773-74.**

* The House Report states in part (p. 2766):

> "A more recent development in language training and area studies [as opposed to training American teachers abroad] is the employment for 1 or 2 years of a foreign teacher by local school boards. Frequently this is an arrangement whereby an American teacher exchanges his position with a foreign national.
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> • • •
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> "The benefits of this program [the United States Information and Educational Exchange Act of 1948, as amended, the original federal legislation in this area] have been felt not only in the classroom but in the community in which the foreign teacher has lived and worked. This paragraph [§ 2452 (b)(6)] is intended to strengthen this type of teacher exchange in the language and area study fields."

** Congress also continued assistance to American schools abroad under 22 U.S.C. § 2452(b)(3). These schools must be established by American citizens, include citizens on the board of directors, have citizen principals and "a sufficient number of teachers from the United States to assure adequate contact for students with U.S. teaching methods and ideals." H. Rep., pp. 2763-64. They provide as American an education as possible for the children of government officials serving abroad and "an American 'educational presence'" in another country which demonstrates "American educational methods" and "influence[s] the development of the educational system of . . . [that] country." H. Rep., p. 2764.

B. Education Law Article 52-A provides for an experimental New York City Community School District System. The article has no effect on the statewide "citizenship" requirements for teaching certificates and is not inconsistent with them.

In 1969, the state Legislature enacted a decentralized commu.. y school district system for New York City (L. 1969, c. 330, § 4), not New York State as appellees (brief, pp. 9-10, 11, 48-52) suggest. See also Brief for *Amici Curiae,* pp. 26-27. The system was intended as an "innovative experiment in education" for nursery through ninth grades. L. 1972, c. 29, § 1, McKinney's Education Law §§ 2101-5500, 1977-78 Supp., p. 89; Education Law § 2590-e. Subsequent legislative modifications were expressly contemplated. See L. 1972, c. 29, § 1, McKinney's Education Law §§ 2101-5500, 1977-78 Supp., p. 89. In the last regular session, a bill (S. 6537) creating a temporary state commission to study the effectiveness of decentralization in meeting the educational needs of New York City pupils was introduced and referred to committee. The legislative findings supporting the need for the commission cite the absence of any improvement in reading and math levels during decentralization, voter disinterest in community school board elections, high per pupil cost and disparate inter-district costs and funding. S. 6537, § 1.*

Community school boards do not "govern" the schools within their geographic boundaries. Compare Appellees' Brief, pp. 10, 11, 48. The central New York City Board of Education makes all citywide policy. Education Law § 2590-g. The Chancellor prescribes minimum educational standards and curriculum requirements subject to the approval of the City Board and evaluates their effectiveness. Education Law §§ 2590-g(1), 2590-h(8). Compare Appellees' Brief, p. 50. Community school boards do hire and fire

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* A true copy of S. 6537 is appended to this brief as Exhibit "B".

teachers and select textbooks and other instructional material, but do so subject to the approval of the Chancellor. Education Law § 2890-e(2), (3). All three units in the community school district system, City Board, Chancellor, and community school boards, operate under other applicable state laws and regulations including those prescribing minimum curriculum standards (Appellants' Main Brief, pp. 9-10) and citizenship requirements for teachers. For example, a community school board cannot hire an alien teacher in violation of Education Law §§ 3001(3), 3001-a, 3005 and 8 NYCRR § 80.2(i). Thus, the vote of an alien parent for members of a community school board [Education Law § 2590-c(3)] and/or his membership on the board [§ 2590-c(4)] do not oppose the operation of § 3001(3) or the state interests it serves.* The very limitations on discretionary authority imposed by § 3001(3) and related provisions require the alien (or citizen) board member to enforce the Legislature's view of the qualifications that make public school teachers most effective.

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* The phrase "parent . . . who is a citizen of the state" in § 2590-c(3) and (4) has been construed to include aliens by the City Board and New York City Board of Elections. Appellees' Brief, p. 49 n. 34. An alternative construction of the phrase would require United States citizenship but not prior registration for general elections. See e.g. *C.D.R. Enterprises, Ltd.* v. *The Board of Education,* 412 F. Supp. 1164, 1166, 1167-68 (E.D.N.Y. 1976), *aff'd sub. nom. Lefkowitz* v. *C.D.R. Enterprises, Ltd.,* 429 U.S. 1031 (1977) wherein the phrase "citizens of the State of New York" in N.Y. Labor Law § 222 had been applied to exclude aliens. There is no legislative history on point, and appellants' research did not identify any uniform definition or use of the term "state citizen" in New York. All school districts outside New York City require citizenship for membership on the board of education or similar body (Education Law §§ 2012, 2102) and for voters at board elections. Education Law § 1602 (Common School Districts); § 1702 (Union Free School Districts); § 1804 (Central School Districts); §§ 2502, 2553 (certain City School Districts); § 2012 (requiring U.S. citizenship to qualify as a voter).

C. Education Law § 3001(3) is excepted from strict equal protection scrutiny because the public school teachers it qualifies make important discretionary decisions and execute broad public policy which substantially affects American democratic institutions. No fundamental right to academic freedom or of access to "common occupations" is invoked by the classification.

Classifications excluding aliens from governmental positions are excepted from strict scrutiny when the positions require "discretionary decisionmaking, or the execution of policy, which substantially affects members of the political community." *Foley* v. *Connelie,* 435 U.S. 291, 296 (1978). (Footnote omitted.) The excepted group of positions is more specifically defined in *Sugarman* v. *Dougall,* 413 U.S. 634, 647 (1973), as consisting of "elective or important non-elective executive, legislative, and judicial positions" because "officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." There are no additional or more objective criteria which distinglish between classifications subjected to or excepted from strict scrutiny. Compare Brief for *Amici Curiae,* pp. 15-27. No distinction is drawn between "policy makers" and "policy executors" or between "political" and "civil" rights. Compare Appellees' Brief, p. 23; Brief for *Amici Curiae,* pp. 16, 21-22, 24, 28-30. Nor has it been previously suggested that the use of the term "officers" in *Sugarman* v. *Dougall, supra,* was intended to confine the excepted group of positions to "sovereign," public officers as distinguished from public employees. Appellees' Brief, pp. 23-24, 25-27; Brief for *Amici Curiae,* pp. 18, 22.* The *Dougall*

* The use of such a test would be inappropriate in the adjudication of constitutional rights because the decision in any given case would depend on formal and often inconsistent state designations for the same or similar classes of positions. For example, if New Jersey designated Deputy Court Clerks as public officers and Pennsylvania designated them as public employees, the aliens excluded from the positions would probably lose the New Jersey case because of the application of the rational basis test and win the Pennsylvania case because of the application of strict scrutiny.

opinion itself uses the terms "public employment" and "employee" in the same context as the term "officers." 413 U.S., *supra,* at 647. At least one commentator has read the term "officers" in *Dougall* to include "jobs having a critical relationship to the preservation of the political community, even if those jobs cannot be classified as 'offices.'" Note, *Aliens' Right to Teach,* 85 YALE L.J. 90, 96 (1975). (Footnote omitted.) The allocation of positions between excepted and non-excepted categories is "functional" and should be based on the "actual relationship" between the position and the "political community." *Id.* at 99, noting, *inter alia,* that the exclusion of aliens from juries sustained in *Perkins* v. *Smith,* 370 F. Supp. 134 (D. Md., 1974), *aff'd* 426 U.S. 913 (1976), did not rest on a finding that jurors were public officers or high government officials. This view conforms with the direction in *Foley, supra,* to "examine" each position to determine whether it incorporates the qualities ("discretionary decisionmaking" or "execution of policy" and substantial effect on the "political community") which except it from within strict scrutiny.

The teaching positions Education Law § 3001(3) qualifies have an "actual relationship" with and a substantial effect on the "political community." Both the appellees and the *Amici Curiae* concede the controlling principles appellants advance on this point: first, public school education trains pupils to be citizens by providing them with the knowledge, skills, values and attitudes that enable and encourage participation in American democratic institutions (main brief, pp. 15-16, 20-23)* second, public school teach-

* Public school education is itself a matter of constitutional prerogative and protection in New York. N.Y. Const. Art. 11, § 1. Appellants' Main Brief, p. 8. See *Sugarman* v. *Dougall,* 413 U.S., *supra,* at 648. The state Education Department, charged with enforcing § 3001(3), is part of the executive branch of state government. N.Y. Const., Art. 5, §§ 2, 4. The Department, with the local school districts, 'monopolize" public education. Compare Appellees' Brief, p. 25.

ers are immediately and directly responsible for achieving this state interest in education (main brief, pp. 9-10, 18, 23-24); and third, the teacher instructs from curriculum materials and by his own example (main brief, pp. 16-17. 24-25).* Their opposing arguments merely claim that teachers do not make 'discretionary decisions' or 'execute policy' when they function in terms of the state interest and in the manner just described. Compare Appellants' Main Brief, pp. 16, 23-25 with Appellees' Brief, pp. 27-30 and with Brief for *Amici Curiae,* pp. 23-26, 28-30.** These arguments rely on descriptions of New York educational practices which have no foundation in state law or the record of this case. Their acceptance would attribute less governmental importance to public school teachers than to policemen and jurors although teachers are responsible for educating and encouraging their pupils to accept the public duties those positions entail. See *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954) and discussion, pp. 13-15.***

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* Appellees admit that a teacher's own values and attitudes are transmitted to his pupils. Brief, p. 65. They question only the "amount" of this influence. *Id.* at 65-66. See discussion, pp. 20-21.

** The *Amici Curiae* (brief, pp. 20, 27-28) argue, in addition, that teachers do not perform functions that "go to the heart of representative government" even if it is conceded that teachers participate directly in the "formulation, execution, or review of broad public policy." *Sugarman* v. *Dougall, supra.* The argument is inapposite because it is the very act of "formulating, executing or reviewing" public policy that *Dougall* views as "going to the heart of representative government." Even if the appropriateness of the argument is assumed, it must fail in face of the conceded purpose of public education to train pupils for their roles as citizens.

*** This Court's application of the strict scrutiny standard to Connecticut's exclusion of aliens from the bar in *In Re Griffiths,* 413 U.S. 717, 729 (1973), does not support the application of the

(footnote continued on following page)

New York public school teachers do not teach "a State-prescribed course of study in State-prescribed class situations." Brief of *Amici Curiae,* p. 23; Appellees' Brief, p. 28. State curriculum standards are "limited" and "generalized." Appellants' Main Brief, p. 9. For example, the curriculum for elementary schools requires instruction in "arithmetic, reading, spelling, writing, [etc.]." Education Law § 3204(3)(a)(1); 8 NYCRR § 100.1(e). See discussion and citations in Appellants' Main Brief, pp. 9-10, 30, 31. There are no other state laws or regulations that describe the content of the state standards more specifically and there is no support for the view that curriculum standards established by local school boards are more specific.* On the record of this case, the teacher retains the discretionary choice to communicate the information and skills he believes important in the subject matter areas under his control. Appellants' Main Brief, p. 24. Even if local curriculum standards are assumed to be specific and strictly enforced, they would not be more detailed than the penal

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(footnote continued from preceding page)

same standard to Education Law § 3001(3). Compare Appellees' Brief pp. 10, 29, 30, 34; Brief of *Amici Curiae,* pp. 25-26. The *Griffiths* classification included all lawyers only some of whom would participate in or have a substantial effect upon governmental institutions. Brief of *Amici Curiae,* pp. 35-36. The decision does not suggest that Connecticut could not qualify such governmental lawyers in terms of citizenship and/or that their responsibilities would be considered higher than those of public school teachers.

* The State Education Department does publish curriculum guides for elementary and secondary schools and Regents syllabi to assist teachers in preparing students for optional Regents examinations. These guides and syllabi are advisory and may be used in whole, or part, or discarded in the discretion of teachers and local school boards.

laws that policemen enforce. More significantly, curriculum standards are irrelevant to the teacher's communication of knowledge, skills, values and attitudes by his own example and to the various normative judgments he makes about the behavior, societal adjustment and career potential of his students. Appellants' Main Brief, pp. 23-25. Qualifying requirements like Education Law § 3001(3) are the only effective means for insuring that the teacher's example is in harmony with the purpose of his instruction and that he accepts the instructional framework which his judgments should reflect and in which they will operate. Appellants' Main Brief, pp. 19, 25.*

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* The results of the survey of state "citizenship" requirements conducted by the attorneys for the appellants and appellees (appended to this brief as Exhibit "C") do not diminish the importance of the responsibilities of public school teachers or the effectiveness of citizenship requirements in securing their appropriate execution. See Appellees' Brief, pp. 29, 56-60. Forty-four states plus Guam and Puerto Rico responded to the survey. Of this group, 10 require citizenship or a declaration of intent for all public school teachers or for permanent public school teachers under statutes that remain in full force and effect, i.e. Georgia, Idaho, Montana, North Dakota, Puerto Rico, South Carolina, Tennessee, Texas, Washington and West Virginia. Three, Mississippi, South Dakota and Wyoming, require citizenship or declarant status under statewide regulations. Ten (Alaska, California, Guam, Illinois, Massachusetts, Michigan, New Jersey, Oregon, Pennsylvania and Rhode Island) repealed or otherwise invalidated their "citizenship" requirements on counsel's advice that *Sugarman* v. *Dougall, supra*, or similar precedent required that result. Neither the Education Departments nor the professional educators in these 10 jurisdictions sought the repeal of the requirements or indicated that they were inappropriate or unnecessary for the achievement of the state interests involved. The remaining 23 jurisdictions do not have statewide citizenship requirements although it is unclear whether they have and enforce such requirements locally. As appears from these results, the reporting jurisdictions would be evenly balanced (23/23) with respect to statewide citizenship requirements if 10 had not erroneously (in appellants' view) anticipated the course of constitutional law.

New York public school teachers do not conduct their classroom activities "in the presence of other teachers, student teachers and teachers' aides" (Appellees' Brief, p. 29 n. 20), and they are not closely or continuously supervised by a superintendent or principal. *Id.* at 25 n. 18. For example, the average number of elementary school pupils for one teacher is 19.47; the average number of secondary school pupils for one teacher is 17.47. Elementary schools average 584 pupils each; secondary schools, 995 pupils. There are only 6,876 full-time and 15,606 part-time teacher aides to assist approximately 173,975 teachers.* There is usually one principal per school, and one superintendent per school district or community school district. Education Law §§ 2204, 2507, 2567, 2590-e(1)(a), 2590-h. These circumstances do not allow the "team" teaching approach appellees contemplate and do not lend themselves to detailed review of teacher conduct by principals or by aides even assuming that the latter practice were considered appropriate. At a minimum, the New York public school teachers cannot be viewed as more highly supervised than New York police officers who respond to the superior officers through a chain of command.**

Strict scrutiny cannot be applied to Education Law § 3001(3) on the alternative theory that the statute violates a "fundamental right" that aliens possess. Compare Appellees' Brief, pp. 31-33, 64-71 (alleged fundamental right to academic freedom); pp. 33-38 (alleged fundamental

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* The preceding figures were provided by the Education Department, Bureau of Teacher Education. See also Appellants' Main Brief, p. 13.

** *Ingraham* v. *Wright* is not opposed. One may accept the premise that there is sufficient interaction between pupils and parents, between pupils and teachers and between schools and the community to prevent and detect physical abuse of Eighth Amendment dimensions without agreeing that the same inter-actions provide a high degree of supervision for teachers or secure the purposes of Education Law § 3001(3). Compare Appellees' Brief, p. 39 n. 20.

right of access to "common occupations").* Indeed, acceptance of this theory would have the anomalous consequence of providing aliens (and only aliens) with a fundamental right to teach what their pupils have no fundamental right to receive. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 37 (1973).

Appellees recognize (brief, pp. 31-32) that there is no constitutional or fundamental right to academic freedom standing alone, but only such rights as derive from the First Amendment protection of freedom of speech and freedom of association. See e.g. *Tinker* v. *Des Moines School District,* 393 U.S. 503, 505-507 (1969); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603-604 (1967); *Shelton* v. *Tucker,* 364 U.S. 479, 485-86 (1960); *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957). Education Law § 3001(3) has no cognizable effect on speech or association as those terms have been construed by this Court. Section 3001(3) does not prescribe or regulate the actual or symbolic speech of the teachers it includes, the applicants it excludes or of the pupils who receive instruction. See e.g. *Keyishian* v. *Board of Regents,* 385 U.S. *supra* at 597, 599, oath for college teachers there invalidated as vague regulated "treasonable and seditious" utterances and advocacy, advice or teaching a doctrine. Moreover, a public school teacher does not have a right to use his classroom as a platform for the free expression of his ideas. His speech may be restricted in order to promote the efficiency of the "public services" his school provides. *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968). See also *Tinker* v. *Des Moines School District,* 393 U.S., *supra* at 509, protecting armbands worn by pupils without disruption as speech, but stating that restrictions on speech in public schools could be justified by showing merely that they were not intended "to avoid the discomfort and unpleasantness that accompanies an unpopular viewpoint."

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* Appellees did not present these arguments to the three-judge district court. See Plaintiffs' Memorandum of Law, Record on Appeal, Document 10 ("R. Doc. "); Transcript of Proceedings on Feb. 11, 1976, R. Doc. 18; and Ennis letter, dated Feb. 23, 1976, to the three-judge court, R. Doc. 27.

Section 3001(3) is a qualifying requirement for public school teachers in New York. Its effect on the associational interest of an applicant for a teaching certificate is the same as the education, experience and character requirements New York also enforces and for which appellees do not suggest a First Amendment dimension. See Education Law § 3001(1), (2); 8 NYCRR Parts 7, 8.83. Even if an associational right were involved, it would not disable job-related inquiries. *Shelton* v. *Tucker,* 364 U.S., *supra* at 487-88.

'Orthodoxy,' 'standardization,' 'homogeneity' of ideas or coerced 'political identification' are not concomittants of the citizenship requirements established by § 3001(3). Compare Appellees' Brief, pp. 32-33, 41-44, 66-71. Section 3001(3) does not prescribe or proscribe subject matter or teaching methods. *Epperson* v. *Arkansas,* 393 U.S. 97 (1968) (proscription on teaching Darwinian theory); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923) (proscription on teaching foreign languages). It does not require a public school teacher to embrace an ideology, to agree with national, state, or local governmental policies, to join a political party or to submerge his cultural or ethnic differences. In fact, § 3001(3) contemplates the opposite behaviors. Becoming a citizen enables the permanent resident alien to make his own 'political' selections, to express his ideas and 'differences' effectively and to have them incorporated in the societal decisions which govern him. In sum, it permits him to do exactly what he wants to teach his pupils to do.

Appellees' argument that Education Law § 3001(3) affects a "fundamental right" of access to "common occupations" fares no better than their First Amendment claim. This right derives from the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska,* 262 U.S.,

supra, at 399; *Truax* v. *Raich*, 239 U.S. 33, 39 (1915), and has not been designated as "fundamental" for purposes of strict scrutiny. As appellees recognize (brief, p. 34 n. 24), it is merely a "short-hand way" of stating that applicants for employment should be free from limitations which are "unrelated" to their "ability" or capacity "to perform the job." Citizenship requirements are 'job-related' when they apply to positions which involve "discretionary decision making, or execution of policy, which substantially affects members of the political community," *Foley* v. *Connelie*, 435 U.S., *supra*, at 296, and public school teachers hold such positions. See discussion, pp. 11-15. The positions do not become "common occupations" because they are numerous. Compare Appellees' Brief, p. 35.

D. Education Law § 3001(3) meets all equal protection and due process standards because it precisely enforces New York's substantial interest in training public school pupils for their roles as citizens.

Appellees admit that New York's interest in training pupils to be citizens by "*imparting* democratic principles and attitudes" is "permissible." Brief, p. 42. (Emphasis original.) The *Amici Curiae* assume that it is "substantial" and "compelling." Brief, pp. 30, 31. Appellees' selection of the less significant designation relies on three contentions: First, the Legislature disclaimed any interest in excluding alien teachers from public schools in 1967 when it delegated power to make regulations on the subject to the Commissioner of Education (brief, pp. 45-47); second, the Legislature authorized aliens to govern public schools when it enacted the Community School District System for New York City (brief, pp. 48-53); and third, Education Law § 3001(3) is subject to inconsistent statutes and regulations which permit aliens to teach in private schools and to obtain temporary public school certificates (brief, pp. 53-55). Each of these contentions is false. As appellants have already shown (pp. 4-6 and

Exhibit "A"), the Legislature has not invested the Commissioner with regulatory power to oppose the citizenship requirements for permanent certificates established by § 3001(3), and it has not authorized aliens to govern public schools in New York City or community school boards to oppose the enforcement of § 3001(3) (pp. 8-9 and Exhibit "B"). Aliens can teach in private schools. While it is in New York's interest to protect the citizenship education private schools provide (at least to citizens and resident aliens), it is also in New York's interest to protect the "other values" they teach. Appellants' Main Brief, pp. 29-31. Appellees do not refute appellants' description of the differences between public and private schools and do not suggest any basis for changing the current accommodation between state interests that reflects the constitutional status of public schools, not private schools. N.Y. Const. Art. 11, § 1. Section 80.2(i), Title 8 NYCRR, authorizes only temporary certificates for public school teachers. Only aliens who are disabled from applying for citizenship and thus do not manifest the 'negative example' of the aliens excluded from permanent certificates by § 3001(3) can obtain certificates under § 80.2(i)(2).* Only aliens whose services are required on an emergent basis can obtain certificates under § 80.2(i)(1). See Appellants' Main Brief, pp. 7, 19, 27-28. Appellees do not suggest how New York could justify a failure to yield its interest in the most effective public education possible to its interest in some education under such circumstances.

Education Law § 3001(3) distinguishes between eligible and ineligible aliens on the basis of their capacity to participate in the institutional processes teachers 'impart' to their pupils by the content of their instructon and by their own example. The use of this criterion is relevant and does not result in an overinclusive classification. Appel-

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* The "negative example" of the permanent resident who refuses citizenship is enhanced by a lengthy stay. Accordingly, he does not become a more suitable teacher with each passing day. He becomes a less suitable one. Compare Appellees' Brief, pp. 61-62.

lants' Main Brief, pp. 25-27. Compare Appellees' Brief, pp. 11-12, 72-76; Brief for *Amici Curiae*, pp. 35-36.* No teacher from a foreign country can participate in the institutional processes he would have to impart no matter how much his country was 'like our own.' Compare Appellees' Brief, pp. 72-73. Any public school teacher in New York can be required to teach any subject at least part-time, and all teachers instill their own values and attitudes regardless of the subject they instruct. Appellants' Main Brief, pp. 24-25, 26-27. Compare Appellees' Brief, pp. 73-76; Brief for *Amici Curiae*, pp. 35-36. Teachers influence the political attitudes of their pupils in this manner throughout elementary and secondary school. See HESS & TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN ("Political Attitudes in Children") 101, 217, 219 (1967), stating (p. 219) that the school is "the central, salient and dominant force in the political socialization" of the child. Appellees' references (brief, pp. 65 n. 45, 66 n. 47, 75 n. 58) to the same study, Political Attitudes in Children, pp. 214, 218, and to JENNINGS & NIEMI, THE POLITICAL CHARACTER OF ADOLESCENCE ("Political Character") 182, 183 (1974), admit the existence of this influence and the span of time involved.** Although the teacher's effect on his pupils may be strongest in nursery through eighth grades, Political Attitudes in Children, pp. 112, 114; Political Character, pp. 193, 217, it continues through high school, reinforcing the earlier-acquired attitudes of some pupils and affecting a significant number of pupils profoundly. Politi-

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* Contentions that Education Law § 3001(3) is underinclusive because it does not apply to private schools or because temporary certificates are authorized under 8 NYCRR are refuted above. See Appellees' Brief, pp. 53-55, 71-72; Brief for *Amici Curiae*, pp. 36-39. Appellees' additional contention (brief, *ibid.*) that § 3001(3) is underinclusive because it permits a "dual citizen" to obtain a permanent certificate is inapposite. Dual citizens can participate in the institutional processes they teach.

** Education Law § 3001(3) does not apply to college teaching See pp. 2-4. Compare Appellees' Brief, pp. 74-75.

cal Character, pp. 193-206. The only arguably open question about teacher influence is one of amount, and it is occasioned by the current limits of quantitative measurements, not doubt among experts about its existence. Political Attitudes in Children, p. 111; Political Character, pp. 182, 328. Strict scrutiny should not be applied adversely to appellants for this reason since no statutory program could ever be more precise than the state of art in the field it regulates allows. Moreover, the question, if relevant at all, is an evidentiary one more appropriately considered on remand of this case. Appellant's Main Brief, pp. 32-33.*

A loyalty oath is not a "less drastic means" for enforcing the interests Education Law § 3001(3) reflects. Compare Appellees' Brief, pp. 55-56; Brief for *Amici Curiae*, pp. 31-32, 32-35. Taking an oath does not enable an alien to participate in the institutional processes he would 'impart' as a teacher, and accordingly, it cannot be viewed as satisfying the interests § 3001(3) serves. Conversely, application for citizenship and timely completion of the process is relevant to these interests. When the alien accepts the inclusionary requirement, he becomes a positive example of the principles he must impart to his pupils. If he rejects the requirement, he continues to be a 'negative example.' See Appellants' Main Brief, p. 25. All aliens excluded from permanent certificates have in fact made this choice. Given that their choice disqualifies them under the classification's express terms, they cannot

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* Appellants' offer of proof to the district court was procedurally correct. Compare Appellees' Brief, p. 102. The offer was made in response to the invitation of the court (Transcript of Proceedings on Feb. 11, 1976, R. Doc. 18, p. 30), which contemplated post-argument submissions by both sides. *Id.* at pp. 9, 30. See Gordon letter, dated Feb. 19, 1976, R. Doc. 26, and Ennis letter, dated Feb. 23, 1976, R. Doc. 27. The offer did not oppose appellees' fact statement, but would have provided the court with evidence on the 'necessary relation' issue if such evidence was required or appropriate under strict scrutiny.

be qualified by some other means. Compare Brief of *Amici Curiae,* p. 32.

If, as appellants contend, Education Law § 3001(3) survives strict equal protection scrutiny, it also survives heightened due process standards. See Appellees' Brief, pp. 96-101; Brief of *Amici Curiae,* pp. 55-62. *Weinberger* v. *Salfi,* 422 U.S. 441 (1975); *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632, 39 L. Ed. 2d 52, 66-70 (1974) (POWELL, J., concurring in result); 39 L. Ed. 2d, *supra,* at 70-72 (REHNQUIST, J., dissenting); *Vlandis* v. *Klein,* 412 U.S. 441, 459-63 (1973) (BURGER, C.J., dissenting); *Stanley* v. *Illinois,* 405 U.S. 645, 662 (1972) (BURGER, C.J., dissenting).

E. No general or specific federal laws pre-empt Education Law § 3001 (3).

State laws affecting aliens are not *per se* pre-empted by the federal constitutional power over immigration and naturalization whether latent or exercised. *De Canas* v. *Bica,* 424 U.S. 351, 355 (1976); *Graham* v. *Richardson,* 403 U.S. 365, 372 (1971); *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410, 420 (1948). Compare Appellees' Brief, pp. 78-79; Brief for *Amici Curiae,* pp. 63-65. The Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.,* does not prevent the states from conditioning the employment of aliens on the acquisition of citizenship. Compare Appellees' Brief, pp. 84-89. To the extent that the Act speaks to this subject at all, it must be read as approving such conditions. Although no longer part of the naturalization process, the declarant provision [8 U.S.C. § 1445(f)] continues in force evidencing Congressional awareness of the state (and federal) laws that utilize such requirements.

Section 1981, Title 42 U.S.C., does not prevent states from conditioning the public employment of aliens on the acquisition of citizenship. Compare Appellees' Brief, pp. 79-83. Such employment is not a matter of "security of

persons and property" within the meaning of the statute. *Heim* v. *McCall,* 239 U.S. 175, 193-94 (1915), construing identical language in a treaty with Italy and sustaining exclusion of aliens from employment on public works; *Patsone* v. *Pennsylvania,* 232 U.S. 138, 145 (1914), construing same language and sustaining prohibition on aliens hunting wild game.

In light of these considerations, appellees' pre-emption argument can only be sustained if § 3001(3) " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " in enacting the Immigration and Nationality Act. *DeCanas* v. *Bica,* 424 U.S., *supra,* at 363 quoting *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941) and *Florida Avocado Growers* v. *Paul,* 373 U.S. 132, 141 (1963). In this context, the Court determines if the statute under review discriminates against lawfully admitted aliens by imposing "additional burdens not contemplated by Congress." *DeCanas* v. *Bica,* 424 U.S., *supra,* at 358 n. 6. *Takahashi* v. *Fish & Game Commission,* 334 U.S., *supra,* at 419. See Appellees' Brief, pp. 81-87; Brief for *Amici Curiae,* pp. 65-67. The phrase "additional burdens" is confined to broad-based discrimination which denies aliens the ability to earn a livelihood or to obtain the other necessities of life since only these kinds of limitations would amount to denial of "entrance and abode." *Truax* v. *Raich,* 239 U.S., *supra,* at 42. With respect to employment, only state limitations which deny access to "common occupations" reach the proscribed level. Any other view is inconsistent with *Foley* v. *Connelie, supra,* and *Sugarman* v. *Dougall, supra,* which permit aliens to be excluded from important governmental positions. As shown (pp. 11-15, 17-18), Education Law § 3001(3) is not a limitation on a "common occupation" and thus cannot be viewed as an "additional burden" on any Congressional program.

The fact that alien teachers receive a third preference [8 U.S.C. §§ 1102(a)(32), 1153(a)(3)] requiring labor cer-

tification when they enter the United States as permanent residents [8 U.S.C. § 1182(a)(14)] does not oppose § 3001 (3). Compare Appellees' Brief, pp. 85-89.* These provisions do not prevent states from conditioning employment on the acquisition of citizenship. In fact, certification procedures are usually initiated by the incoming alien's prospective employer. Assuming that a New York school board would seek such an employee, the board would enforce § 3001 (3) and the alien would be so advised while still in his native country. Elementary and secondary school teachers are not on the 20 C.F.R. § 656.10 "A" list which permits an alien to enter the United States without a pre-existing employment contract, and there is no indication that they ever have been.

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* The record does not indicate that appellees entered the United States under these provisions.

CONCLUSION

For the foregoing reasons and those set forth in Appellants' Main Brief, the Order and Judgment below should be reversed and Education Law § 3001 (3) declared constitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Alternatively, the Order and Judgment should be vacated, and the case remanded for a hearing on the necessary relation between the classification established by the statute and New York's interest in educating public school children for participation in American democracy.

Dated: New York, New York
January 5, 1979

Respectfully submitted,

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* The Attorney General gratefully acknowledges the assistance of Theresa Wolinski, Legal Aide, in the preparation of this brief.

Exhibit "A"

6970/2/99999/7985

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

To: Mr. Charles C. Mackey, Jr. Date: April 11, 1972

From: James H. Whitney JHW

Subject: Proposed amendment of Section 80.2 (i) of the Regulations of the Commissioner

I have reviewed your proposed amendment to eliminate the citizenship requirement for permanent certification. It is the opinion of this Office that the Commissioner lacks the statutory authority to promulgate the proposed amendment. While the 1967 amendment of subdivision 3 of section 3001 is broad in language, this provision must be read together with section 3001-a of the Education Law. The latter section specifically contemplates temporary service as a teacher by those aliens who are unable to become citizens because of an over-subscribed immigration quota. The Regulations presently reflect the legislative intent expressed in section 3001-a. I do not believe one can argue that the Legislature impliedly repealed section 3001-a when they amended the last sentence of subdivision 3 of section 3001.

I therefore suggest that you consider proposing legislation for the 1973 Legislative Session which would clearly express the intention to permit aliens to become permanently certified as teachers. This should be done through the normal channels for submitting legislation as a part of the Regents legislative program.

JHW:ms

Exhibit "B"

Senate Bill 6537

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Exhibit "C"

States	Statute	Regulation	Provision repealed or invalidated in response to Graham v. Richardson, 403 U.S. 365 (1971); Sugarman v. Dougall, 413 U.S. 634 (1973), and related cases
Nebraska	none	none	
Nevada	none	none	
New Hampshire	no response		
New Jersey	NJSA §§ 18A:26-1 18A:26-8.1, 18A:28-3, 18A:6-39 require citizenship or declaration for teaching certificates.	Regs. implement statute	1974 Atty. Gen. Op. found citizenship requirement unconstitutional relying on Dougall and In re Griffiths but would allow requirement for specific classes of teaching positions for reasons shown.
New Mexico	none	none	
North Carolina	none	none	
North Dakota	No. Dakota Century Code § 15.36.07, 15-36.11, requires citizenship or declaration for teaching certificate. Non-citizen can get a temporary certificate renewable annually.	none	
Ohio	none	none	
Oklahoma	no response		
Oregon	none	none	Former citizenship requirement for teaching certificate repealed in 1973 as a result of a lower court decision.
Pennsylvania	none	none	Penn. Code Title 22, § 49-12 required U.S. Citizenship or declaration. Repealed in 1977 based on 1973 Atty. Gen. Op. relying, inter alia, on Graham.
Puerto Rico	Title 18 of Laws of Puerto Rico Ann. § 204 requires either U.S. or Puerto Rican citizenship for teaching certificates.	same	
Rhode Island	none	none	
South Carolina	Code of Laws of South Carolina §59-25-120 (1976) requires citizenship or declaration for teaching certificates.	same	
South Dakota	none	SDCL § 13-42-6 requires citizenship or declaration for all public employment, may be waived.	
Tennessee	Tenn. Code. Ann. § 49-1303 requires citizenship for teaching certificates. Non-citizens may obtain tempoary certificates.	none	
Texas	Vernon's Texas Code Ed. Code Ann. 13-044 citizenship or declaration for teaching certificate.	Non-declarant may obtain temporary certificate for up 5 years.	
Utah	none	none	
Vermont	none	none	
Virginia	none	none	
Washington	RCW 28A.67.020 requires citizenship or declaration for teaching certificates. Non-declarants may obtain temporary certificates.	none	
West Virginia	Code 18A-3-1 requires citizenship or declaration for teaching certificate.	none	
Wisconsin	none	none	
Wyoming	none	Citizenship or declaration required for teaching cerfiticates.	

Survey of State "Citizenship" Requirements for Public School Teachers

States	Statute	Regulation	Provision repealed or invalidated in response to Graham v. Richardson, 403 U.S. 365 (1971); Sugarman v. Dougall, 413 U.S. 634 (1973), and related cases
Alabama	none	none	
Alaska	none	none	Pre-1976 regulation required oath which only citizens had capacity to take. Modified after Dougall.
Arizona	none	none	
Arkansas	no response		
California	none	none	Pre-1970 statute required citizenship. Considered invalid after Purdy & Fitzpatrick Co. v. California, 456 F. 2d 645 (1969).
Colorado	no response		
Connecticut	none	none	
Delaware	none	none	
Florida	no response		
Georgia	Ga. Code Ann. § 89-106 generally excludes aliens from public employment. Aliens may be employed if citizens are not available.	none	Atty. Gen. Op. #76-74 issued after Dougall declared citizenship requirement unconstitutional Opinion adopted in 1976 by Board of Regents for teaching positions in public universities
Guam	none	none	Pre-1975 teachers were required to be U.S. Citizens, Govt. Code of Guam Title XII § 11300. Statute was repealed in 1975, Public Law 12-207.
Hawaii	none	none	
Idaho	Idaho Code §33-1202 requires citizenship or intention to become such for teaching certificate.	none	
Illinois	Ill. Rev. Stat Ch. 122 § 21-1. requires citizenship or declaration for teaching certificate.	same as statute	Attorney General Op. #S747 declared citizenship requirement unconstitutional, relying inter alia, on Dougall, In re Griffiths, 413 U.S. 717 (1973) and Graham.
Indiana	no response		
Iowa	none	none	
Kansas	none	none	
Kentucky	none	none	
Louisiana	none	none	
Maine	none	none	
Maryland	none	none	
Massachusettes	MGLA Ch. 71 §38G Ed. Law requires applicants for teaching certificates to be citizens. Declarants may obtain two year certificate, renewable twice.	Mass. Regs. Vol. VIII Part 3 at 138-140 repeats statute.	St in op Do
Michigan	none	none	Fo ci te on Op re an 71
Minnesota	none	none	
Mississippi	none	Ed. Dept. regs. require applicants for certification to be U.S. citizens.	
Missouri	none	none	
Montana	School Laws of Montana §§ 75-6004(3), 64-6005 (1971) require citizenship for teaching certificate.	same as statute	